

COMMUNICATIONS ADVISORY COUNSEL LLC

2154 Wisconsin Avenue N.W.
Washington, D.C. 20007

Tel. 202-333-5273
Fax 202-333-5274

Sylvia Lesse
sylvia@Independent-Tel.com

March 21, 2008

Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
236 Massachusetts Avenue NE
Suite 110
Washington, DC 20002

Attn: John Branscome
Chief, Spectrum and Competition Policy Division
Wireless Telecommunications Bureau

Re: NEP Cellcorp, Inc.
Amendment to November 2007 HAC Report
and Request for Temporary Waiver *Nunc Pro Tunc*
WT Docket No. 01-309

Dear Madam Secretary:

NEP Cellcorp, Inc. ("NEP"), by counsel, hereby amends its November 14, 2007 report (the "November Report") and requests a temporary waiver, *nunc pro tunc*, of Section 20.19(b)(2) of the Commission's Rules regarding the maintenance of two (2) telecoil compliant phones in its inventory during the period February 1, 2007 through January 11, 2008.

In its November Report, NEP mistakenly, albeit in good faith, report that it was fully compliant with the Commission hearing aid compatibility ("HAC") requirements, codified in Section 20.19 of the Commission's Rules, 47 CFR § 20.19. In making that statement, NEP now recognizes that it had misinterpreted available information regarding HAC requirements, and did not differentiate between acoustic coupling compliance ("M" ratings) and inductive coupling compliance ("T" ratings). At that time, NEP also misunderstood meeting text telephone ("TTY") requirements as HAC compliance items. As is evident from the listing of handset models available to consumers contained in its November Report, NEP offered only one handset compliant model meeting the T3 rating for inductive coupling -- the Motorola V3i (FCC ID No. IHDT56GW1).

The Commission's January 3, 2008 release of a Notice of Apparent Liability for Forfeiture¹ caused NEP to review its understanding regarding compliance and to reassess its status. Upon understanding its error, NEP immediately initiated a search for compliant phones, and, as of January 11, 2008, procured the Motorola RAZR2 V8 (FCC ID No. IHDT56HZ1) as part of its inventory. Subsequently, additional phones complying with the inductive coupling requirements have also been added to NEP's inventory: Motorola W510 (FCC ID # IHDT56HB2); Nokia 6085 (FCC ID # LJPRM-198H); and Sony Ericsson S500i (FCC ID # PY7A1052041).

Accordingly, NEP submits this information to amend the November Report. In addition, NEP further updates the November Report by (1) confirming that all phone models, including those meeting the inductive coupling requirements, are available for in-store testing; and (2) reporting that of the thirteen handset models currently marketed to subscribers, six are rated M3 or higher.²

Having recognized its error, NEP is voluntarily notifying the Commission of its status and the actions it has taken to correct the lapse. In addition to becoming compliant with the specific requirement as soon as possible,³ NEP's inadvertent non-compliance initiated a broader internal review, resulting in the revision of regulatory oversight policies to ensure that its compliance status is monitored on a regular basis. These new procedures include (1) designation of the Vice President of Operations as the officer responsible for all FCC compliance matters; and (2) periodic review by the President to ensure that regulatory compliance policies are effective in identifying and implementing regulatory obligations.

NEP is a new Tier III carrier, having launched initial wireless service only last year (on February 1, 2007). At launch and continuing through the period ending January 11, 2008, as a result of its misinterpretation of Commission requirements, NEP offered only one T-standard compliant handset. Having recognized its error, NEP immediately corrected the specific infraction and has instituted procedures to ensure that its regulatory obligations are met in an efficient and timely manner. NEP submits that the relatively short period of non-compliance, coupled with its immediate correction upon recognition of its error, and its voluntary notification of the error to the Commission, constitutes good cause for the grant of a waiver *nunc pro tunc*.

The Commission may grant a request for waiver of a rule provision if, in view of unique or unusual factual circumstances, application of the rule(s) would be inequitable, unduly

¹ *South Canaan Cellular Communications, Company, L.P.*, Notice of Apparent Liability for Forfeiture, DA 08-14 (rel. Jan. 3, 2008) ("NAL").

² Current M-3 or higher rated models include Motorola RAZR V3 (FCC ID # IHDT56E43); Motorola RAZR V3i (FCC ID # IHDT 56GW1); Motorola W510 (FCC ID # IHDT56HB2); Motorola RAZR V8 (FCC ID # IHDT56HZ1); Nokia 6085 (FCC ID # LJPRM-198H); and Sony Ericsson S500i (FCC ID # PY7A1052041).

³ NEP wishes to call to the Commission's attention the fact that, as a small GSM carrier, its access to handset models is restricted. It has no direct access to equipment manufacturers, and newer phone models are usually available to NEP only long after they have been offered to nationwide carriers. The Commission recently recognized this difficulty in *Memorandum Opinion and Order*, WT Docket No. 01-309, FCC 08-67 (rel. Feb. 27, 2008), wherein *nunc pro tunc* waivers were granted under circumstances similar to those encountered by NEP.

burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.⁴ The combination of NEP's diligence in initiating compliant service, the absence of subscriber harm resulting from its error, the relatively short period of non-compliance and immediate and voluntary correction, all suggest that the imposition of a penalty for NEP's innocent error would be unduly unreasonable and contrary to the public interest. NEP, therefore, seeks grant of a waiver *nunc pro tunc* covering the short period of noncompliance.

Prior to initiating service, NEP diligently reviewed all Commission's operational and other regulatory requirements, held discussions with vendors and consultants, and attended seminars and trade organization meetings, all with the purpose of providing fully compliant service to the public. It identified and divided regulatory duties between reporting/filing obligations and operational requirements, assigning specific duties to several staff members. After the appearance of the NAL and NEP's resulting recognition of its error, NEP retraced the decision-making procedure, and in so doing has come to believe that an initial misunderstanding of a vendor's statements attempting to explain HAC requirements was perpetuated simply because no non-conforming information came to its attention until the issuance of the NAL. As a result of this analysis, NEP's compliance matrix has been modified, as explained above, to establish clearer definitions of duties and to provide multiple oversight levels.

During the subject period, NEP had no requests for HAC-compliant phone from its subscribers, nor did it have any other reason to question its erroneous initial interpretation of the Rules' requirements. In the context of its relative infancy in the wireless arena, NEP's diligent establishment of a regulatory oversight platform and procedure resulted in a reasonable, but erroneous, compliance effort with respect to HAC obligations. This reasonable error, in the context of due diligence, justifies grant of the requested waiver.⁵

Please direct any questions regarding this matter to the undersigned.

Respectfully submitted,


Sylvia Lesse

⁴ See 47 C.F.R. §§1.3, 1.925(b)(3). See also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C.Cir.1969); *appeal after remand*, 459 F.2d 1203 (D.C.Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).


⁵ See, e.g., *In the Matter of Section 68.4(A) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, Memorandum Opinion and Order, 22 FCC Rcd 20,459, n. 73 and accompanying text (2007).

DECLARATION OF STEVEN E. TOURJE

I, Steven E. Tourje, President of NEP Cellcorp, Inc., do hereby declare under penalty of perjury that I have read the foregoing Amendment to November 2007 HAC Report and Request for Temporary Waiver *Nunc Pro Tunc*. The facts stated therein are true and correct, to the best of my knowledge, information and belief.

3-20-08

Date


Steven E. Tourje